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NTSB Order No. EA-3777

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of January, 1993

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11217
v.)	
)	
NGANGA FLORENT,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent, pro se,¹ has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on November 29, 1990, following an evidentiary hearing.² By that decision, the law judge affirmed in part an order of the Administrator which suspended respondent's commercial pilot

¹Respondent was represented by legal counsel at the hearing.

²An excerpt from the hearing transcript containing the initial decision is attached.

certificate for 120 days on allegations that he violated sections 91.5, 91.87(b), 91.87(h), 91.88(c), 91.90(a)(1), and 91.9 of the Federal Aviation Regulations (FAR), 14 CFR Part 91.³ The

³FAR §§ 91.5, 91.87(b), 91.87(h), 91.88(c), 91.90(a)(1), and 91.9 provided, at the time of the incidents, in pertinent part as follows:

"§91.5 Preflight action.

Each pilot in command shall, before beginning a flight, familiarize himself with all available information concerning that flight....

§ 91.87 Operation at airports with operating control towers.

(b) Communications with control towers operated by the United States. No person may, within a airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower...

(h) Clearances required. No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC...

§ 91.88 Airport radar service areas.

(c) Arrivals and overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC prior to entering that area and is thereafter maintained with ATC while within that area.

§ 91.90 Terminal control areas.

(a) Operating rules. No person may operate an aircraft within a terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(1) No person may operate an aircraft within a terminal control area unless that person has received an appropriate authorization from ATC prior to operation of that aircraft in that area.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

allegations consist of three discrete incidents: (1) that on October 26, 1988, respondent entered the San Francisco Terminal Control Area (TCA), without authorization from air traffic control (ATC); (2) that on May 4, 1989, respondent taxied an aircraft onto an active runway at Hayward Airport without receiving an appropriate clearance from ATC and without maintaining two-way radio communication with ATC; and (3) that on October 31, 1989, respondent operated an aircraft in the Fresno Airport Radar Service Area (ARSA) without establishing two-way radio communications with ATC prior to entering the area. As to the Hayward incident, the law judge ruled that because there were no other aircraft either landing or taking off at the time of the incident even the potential for endangerment was too remote to sustain a FAR section 91.9 violation. The Administrator has not appealed that finding.

Respondent raises several narrow issues on appeal. With regard to the October 31, 1989 alleged ARSA violation, he claims that the law judge erred on an evidentiary ruling. With regard to sanction, he asks that it be reduced from 120 days because, he claims, neither the Fresno nor the Hayward incidents caused actual endangerment, and because his pilot certificate is his only source of income. The Administrator has filed a brief in reply.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require

affirmation of the Administrator's order. For the reasons that follow, we will deny respondent's appeal.

With regard to the evidentiary issue, respondent asserts that the law judge prevented him from testifying about a conversation he claims to have had with Mr. Hall Mortenson, the Fresno Quality Assurance Training Specialist. Respondent asserts that had he been able to testify, he would have explained that the writing on Exhibit C-1, a flight progress strip, was Mr. Mortenson's and not that of the air traffic controller who had previously testified that he personally made the altitude entry on the flight progress strip, and that he made the notation contemporaneously with his witnessing the ARSA incursion.

The Administrator argues that even if the law judge erred in excluding this hearsay evidence, it was harmless error, because two air traffic controllers testified that they observed respondent's aircraft on their radar screens and that his Mode C reported his altitude at 3,500 feet, which meant respondent's aircraft was inside the ARSA. Hearsay evidence is admissible in Board proceedings. Administrator v. Howell, 1 NTSB 943, 944 n. 10 (1970). Nevertheless, while it is preferable that a law judge admit such evidence and then accord it whatever significance he deems appropriate, there is no harm where, as in this case, there is more than a preponderance of evidence establishing that respondent's aircraft was in the ARSA. In any event, as the Administrator points out, respondent fails to explain what significance his conversation with Mr. Mortenson would have, when

both controllers testified that they observed the target aircraft on radar at 3500 feet. The identity of the FAA employee who made that notation on the flight progress strip is irrelevant to the finding of a violation.⁴

Turning to the issue of sanction, respondent argues that neither the Fresno nor the Hayward incidents endangered anyone, and therefore a reduction in sanction is warranted. We recognize that the law judge found that there was not even potential endangerment because of the Hayward incident.⁵ However, the potential for endangerment was caused by that incident, and respondent has not contested those factual findings. Moreover, regarding the San Francisco incident, respondent actually endangered not one, but two aircraft, including a passenger-carrying commercial airliner on approach to San Francisco International Airport. In any event, the fact that respondent's carelessness did not result in a tragedies was merely fortuitous and, in our view, is no basis for mitigation of sanction. A 120-day suspension for these three separate incidents, all involving operational violations where respondent failed to properly communicate with ATC, is not inconsistent with precedent and is reasonable under the circumstances.⁶ As to the adverse economic

⁴Respondent's counsels' failure to make an offer of proof precludes any further speculation as to the significance of this evidence.

⁵The law judge apparently misspoke when he later indicated that he was affirming all of the regulatory violations.

⁶ Compare Administrator v. Chavossy, NTSB Order No. EA-3586 (1992) and Administrator v. Thompson, NTSB Order No. EA-3247

impact which respondent claims he will suffer because his certificate is his sole source of income, we have previously held that a respondent's use of his certificate in his occupation can be a legitimate factor, but that it does not justify further reduction in an otherwise reasonable certificate suspension.

Administrator v. Tuomela, 4 NTSB 1422, 1424 (1984).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge's initial decision, and the initial decision are affirmed; and
3. The 120-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)

(1991) (60-day suspension for TCA violation without aggravating factors) with Administrator v. Zingali, NTSB Order No. EA-3597 (1992) and Administrator v. Demar, 5 NTSB 1412 (1986) (90 day suspension for TCA incursion with aggravating factors); Administrator v. Wachsner, NTSB Order No. EA-3153 (1990) (30-day suspension for ARSA violation); Administrator v. Wolfenbarger, NTSB Order No. EA-3684 (1992) (20-day suspension for 91.87(b) violation, but citing Administrator v. Stifel, 3 NTSB 3536 (1981) for proposition that 60 days more appropriate if violation deliberate. In the instant case, while not deliberate, respondent's failure to communicate with the tower was due to his ignorance, i.e., his violation of section 91.5 by failing to determine before departure at 8:30 a.m. that the tower opened at 6:30 a.m.).

⁷For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).